Supreme Court, U.S.
FILED

10-236 AUG 18 2010

No. 10- OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY; SCOTT ERICKSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. GARDINER*
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
**Counsel of Record*

QUESTIONS PRESENTED

1) Whether a firearm is "readily accessible" within the meaning of 18 U.S.C. § 926A where it is inside a locked hard case within an interstate traveler's luggage.

2) Whether the state, under the Due Process Clause of the Fourteenth Amendment, must provide notice and opportunity for a hearing after a criminal charge is dismissed when it retains property which was seized in the cours

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CITED AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION 1

STATUTE 2

STATEMENT OF THE CASE 3

Overview 3
Facts 5
Proceedings in the Courts Below 9

REASONS FOR GRANTING THE WRIT 14

I. THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW, INCLUDING EFFECTIVELY REPEALING A PROVISION OF AN ACT OF CONGRESS 16

A. Revell's Firearm Was Not "Readily Accessible" Within The Meaning Of 18 U.S.C. § 926A 16

B. A Split In The Circuits Being Highly Unlikely, The Court Should Grant The Writ To Prevent The Creation Of An Enclave That Is Hostile To The Exercise Of Second Amendment Rights 24

II. THE RETENTION OF REVELL'S PROPERTY WITHOUT NOTICE AND OPPORTUNITY FOR A HEARING VIOLATED THE DUE PROCESS CLAUSE 25

CONCLUSION 30

APPENDIX

Order of the United States Court of Appeals for the Third Circuit Denying Rehearing 1a

Opinion of the United States Court of Appeals for the Third Circuit 3a

Opinion of the United States District Court for the District of New Jersey(3/31/09) 28a

Opinion of the United States District Court for the District of New Jersey (6/29/07) 50a

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 26

Ford v. *Turner*,
531 A.2d 233 (D.C. 1987) 29, 30

Hudson v. Palmer,
468 U.S. 517 (1984) 25, 26

McDonald, et al. v. *City of Chicago, Illinois, et al.*,
No. 08-1521 (June 28, 2010) 18

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 27

Nevada Dept. of Human Resources v. Hibbs,
538 U.S. 721 (2003) 18

Nixon v. Missouri Municipal League,
541 U.S. 125 (2004) 17

Parratt v. *Taylor*,
451 U.S. 527 (1981) 25, 26

Scheuer v. Rhodes,
416 U.S. 232 (1974) 20

State v. *Williams*,
636 P.2d 1092 (Utah 1981) 20

Swierkiewicz v. *Sorema N. A.*,
534 U.S. 506 (2002) 20

Thornton v. United States,
541 U.S. 615 (2004) 20

Torraco, et al. v. *Port Authority of New York and New Jersey*; *Weasner* v. *Passalaqua, et al.*,
2010 WL 2595312 (2nd Cir. 2010) 24

Zinermon v. Burch,
494 U.S. 113 (1990) 28

UNITED STATES CONSTITUTION

U.S. Const., Art. VI
(Supremacy Clause) 16, 17

U.S. Const., Art. I, Sec. 8
(Commerce Clause) 16

U.S. Const., Second Amendment 15, 23, 24

U.S. Const.,
Fourteenth Amendment 16, 17, 18, 25, 26

UNITED STATES STATUTES

18 U.S.C. § 926A ..... *passim*

Firearms Owners Protection Act of 1986,
Pub.L. 99-308, 100 Stat. 449 (1986) ..... *passim*

FEDERAL RULES

Fed. Rule Civ. Pro. 12(b)(6) 20, 21

Fed. Rule Civ. Pro. 12(c) 20, 21

STATE STATUTES

Florida Statutes § 790.001 ..... 20, 21

N.J. Stat. Ann. § 2C:39-12 23

N.J. Stat. Ann. § 2C:58-3 23

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is published at 598 F.3d 128 (3rd Cir. 2010) and is reprinted in the Appendix ("App.") at App. 1a. The opinions of the district court are not reported and are reprinted in the Appendix at App. 26a (Opinion of 3/31/09) and App. 49a (Opinion of 6/29/07).

JURISDICTION

The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court in a published decision on March 22, 2010. 598 F.3d 128 (3rd Cir. 2010); App. 1a. A timely filed petition for rehearing was denied on April 20, 2010. App. 71a. On July 8, 2010, Justice Alito granted Revell's timely motion to extend the time to file this petition until August 18, 2010. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISION

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const., Fourteenth Amendment, § 1

STATUTE

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

STATEMENT OF THE CASE

Overview

The court of appeals has effectively repealed a key provision of 18 U.S.C. § 926A (enacted as part of the Firearms Owners Protection Act of 1986 ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (1986)) by ruling that an airline traveler stranded overnight through no fault of his own is subject to arrest and prosecution under local law if he has luggage containing unloaded firearms and ammunition in locked hard cases and that were properly declared -- precisely the burden Congress thought it eliminated by enacting FOPA.

The ruling makes interstate travelers vulnerable to the inconsistent patchwork of local firearm laws that FOPA was intended to address. Those impacted include anyone stranded overnight with luggage containing unloaded firearms and ammunition in locked hard cases; anyone who must retrieve and recheck such luggage to make a connecting flight at another terminal or airport; and anyone traveling by vehicle with such luggage on a multi-day journey requiring an overnight stay.

FOPA was intended to permit law-abiding firearm owners to travel freely with firearms throughout the United States without falling victim to inconsistent local regulation by complying with simple, uniform rules established by Congress to facilitate safe and secure interstate travel.

By effectively finding that mere possession of luggage containing unloaded firearms and ammunition in locked hard cases means that the firearms are "readily accessible" (and therefore not subject to FOPA's protection), the court of appeals has thwarted congressional intent and rendered key provisions of § 926A meaningless.

In addition, the court of appeals improperly failed to accept as true all of the factual allegations in the complaint, and made speculative inferences construing the pleadings in the least favorable light to Revell. The Court also legislated a substitute rule, improperly suggesting that firearms must be surrendered to law enforcement during delayed travel to comply with FOPA, even though that would waive Fifth Amendment rights and violate state law (which precludes transfer back to the traveler).

This Court should grant the writ not only because the case raises important questions of federal law, but because it creates a circuit-wide region in which the freedom to travel with firearms is severely limited and imperiled, in direct contravention of FOPA. Although there is no split in the circuits, as a practical matter, a split on this issue is highly unlikely ever to occur, because there are very few jurisdictions like New Jersey where the laws are such that FOPA is significant (so litigation that could result in a split is improbable outside those jurisdictions). And, in the few jurisdictions like New Jersey where FOPA is significant, court decisions have been hostile toward it, promising deeper entrenchment on the issue, and further suggesting that an eventual circuit split is

highly unlikely. Allowing the court of appeals decision to stand permits the creation of an isolated enclave where FOPA's key protections have been summarily erased and persons traveling with firearms are imperiled by an inconsistent patchwork of laws, with no recourse.

Facts

On March 31, 2005, at the Salt Lake City, Utah airport, Petitioner Revell, then 57 years old, checked his luggage with Northwest Airlines for flights from Salt Lake City to Allentown, Pennsylvania with connections in Minneapolis/St. Paul and Newark, New Jersey. Revell was traveling to retrieve a vehicle he purchased and drive it back from Pennsylvania to his home state of Utah, and was traveling with a firearm for personal protection. Revell had a valid Utah concealed firearm permit, which was recognized in Pennsylvania. As required by federal law, Revell declared that, inside his bag to be checked through to his final destination (Allentown, Pennsylvania), he had an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Also as required by federal law, he signed an orange firearm declaration tag, which was put inside the locked hard case with the firearm.

The connecting flight from Minneapolis/St. Paul to Newark on Continental Airlines was 45 minutes late, so Revell missed the final connecting flight from Newark to Allentown. As the next available connection would not leave until several hours later, at 8 p.m. that night, he booked that connection and

waited in Newark Airport without leaving the secure area of the airport. When it was near 8 p.m., Revell gave the attendant his ticket at the gate and went through the door to enter the airplane. To his surprise, he boarded a bus which was to drive him and other passengers to the Allentown airport.

After being seated on the bus, he discovered from the driver that his luggage was not on board. Revell got off the bus and went to the Continental Airlines lost luggage area, outside of the secure area, to retrieve his luggage. At the lost luggage area, Revell was informed that his luggage had not been placed on the bus going to Allentown because the tag on the luggage mistakenly showed that it was only checked to Newark. By the time he retrieved his luggage, the bus to Allentown had already departed. Because there were no more available connections to Allentown until 9:45 a.m. the following morning (April 1, 2005), Revell went directly to, and stayed the night at, the Airport Sheraton Hotel at th expense of the airline. His luggage (inside of which were both locked hard case containers) was placed in the rear, baggage area of the van by the driver of the hotel shuttle van. The bags were not directly accessible from the passenger compartment of the hotel shuttle van as there were two seats between him and the bags and he would have had to climb over the rear seat to get to the bags. Revell did not open either of the locked hard case containers while he was in New Jersey.

The next morning (April 1, 2005), Revell went directly to the airport from the Airport Sheraton Hotel. The bags were again placed in the rear, baggage area

of the van by the driver of the hotel shuttle van where they were not directly accessible from the passenger compartment of the van. He arrived back at the airport at 8:30 a.m. and went to the ticket counter to check his bag; he again declared (as required by federal law) that he had a firearm and ammunition in the luggage, that the firearm was unloaded and in a locked hard case, and that the ammunition was in a separate locked hard case. The agent told Revell to take his bag over to the TSA area to have it x-rayed. Revell again declared the firearm and ammunition. After the bag went through the x-ray machine, the TSA agent on the other end of the machine opened the bag, took out the two locked hard case containers, and asked for the keys to the containers, which Revell gave him. The agent opened the cases and took out the firearm and ammunition. The orange declaration form was still in the hard case with the firearm.

After about 20 minutes, several Port Authority police officers (including Officer Scott Erickson) asked Revell to come to the back of the TSA area, away from the other passengers, where they questioned him about the firearm and ammunition. Revell told them that he had declared the items and was just passing through NJ en route to Allentown, PA. He showed them his Utah concealed firearm permit and driver's license. Officer Erickson testified during his deposition that Revell told him that "he picked up the bag at Newark because he missed his flight, and went out of the airport" and that he went to a hotel that night." Concerning what Revell did with his bag after he picked it up, Officer Erickson testified that Revell "didn't go into detail to the best of my knowledge."

Revell was arrested by Officer Erickson pursuant to state law for possession of a handgun without a permit (N.J.S. § 2C:39-5(b)) and possession of hollow point ammunition (N.J.S. § 2C:39-3(f)), handcuffed, and escorted through the airport by several Port Authority police officers to a police car. The firearm, holster, locks, hard case containers, and ammunition were seized by the Port Authority Police pursuant to established policy of the Port Authority.

Revell five nights incarcerated until he was able to make bail; one day at the Port Authority Jail and then another four days at the Essex County Jail, where (among other things) he was inoculated against his will and denied access to his blood pressure medication. He was finally released on bond on April 5, 2005.

The Essex County Prosecutor administratively dismissed the charges on August 2, 2005. The firearm, holster, locks, hard case containers, and ammunition were not returned to Revell until more than three years later, on July 24, 2008, after repeated demands by counsel.

Proceedings in the Courts Below

On January 27, 2006, Revell and the Association of New Jersey Rifle & Pistol Clubs, Inc. (representing its non-resident members) filed an action in the United States District Court for the District of New Jersey against the Port Authority and Port Authority Police Officer Erickson seeking recovery (damages and injunctive relief for Revell, and injunctive relief for the Association requiring the Port Authority to follow federal law) under 42 U.S.C. § 1983. Jurisdiction was founded on 28 U.S.C. § 1331 as the action arose under the Constitution and laws of the United States. The complaint had four (4) counts.

The first count alleged that the Port Authority and Officer Erickson deprived Revell of the rights, privileges, or immunities secured by 18 U.S.C. § 926A because Revell was entitled to transport a firearm and ammunition through New Jersey, notwithstanding N.J.S. § 2C:39-5(b)(prohibiting possession of a handgun without a permit) and N.J.S. § 2C:39-3(f)(prohibiting possession of hollow point ammunition) as: he was not prohibited by Chapter 44 of Title 18 of the United States Code from transporting, shipping, or receiving a firearm; he was transporting a firearm for a lawful purpose from Utah, where he could lawfully possess and carry such firearm, to Pennsylvania, where he could lawfully possess and carry such firearm; during the transportation of the firearm, the firearm was unloaded; and, during the transportation of the firearm, neither the firearm nor the ammunition were readily accessible, or directly accessible from the

passenger compartment of the aircraft or the bus in which he transported the firearm and ammunition. Revell sought damages for depriving him of the rights, privileges, or immunities secured by 18 U.S.C. § 926A.

The second count alleged that the Port Authority and Officer Erickson deprived Revell of property without due process of law, under the Fourteenth Amendment, by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him. Revell sought damages for depriving him of the rights, privileges, or immunities secured by the Fourteenth Amendment.

The third count alleged that the Port Authority and Officer Erickson deprived Revell of property without due process of law, under the Fourteenth Amendment, by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him. Revell sought an order directing that the property be returned.

The fourth count, for which the Association was the only plaintiff, alleged that non-resident members of the Association, who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A, intended to transport firearms and hollow point ammunition through New Jersey yet are subject to arrest and prosecution under under Port Authority policy and practice pursuant to N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f); that there exists a credible threat of prosecution for violation of

N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f) for non-resident members of the Association who intend to transport firearms and hollow point ammunition through New Jersey and who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A; and that the Port Authority and Erickson are depriving non-resident members of the Association who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A of rights, privileges, or immunities secured by 18 U.S.C. § 926A. The Association sought an injunction enjoining the Port Authority and Erickson from enforcing N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

Erickson moved to dismiss Revell's claims pursuant to Fed. Rule Civ. Pro. 12(b)(6) for failure to state a claim, and the Port Authority (which had answered the complaint) moved for judgment on the pleadings pursuant to Fed. Rule Civ. Pro. 12(c), as to Counts I-III of the complaint; no motion was made with respect to Count IV, the only count involving the Association.

On June 29, 2007, the district court granted the motions as to Counts I-III, with leave to amend, and, *sua sponte*, dismissed Count IV, without leave to amend, on the ground that the Association did not have standing to pursue its claim on behalf of its

members.[1] App. 49a.

As to Count I, which sought to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A, the district court concluded that § 926A did not create a private right of action, but, because "the facts alleged could be sufficient to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment" (App. 64a (Opinion (6/29/07) at 11)), permitted Revell to amend his complaint "to substitute a § 1983 claim for a violation of his Fourth Amendment rights in place of his § 1983 claim for a violation of 18 U.S.C. § 926A . . . ." App. 70a (Opinion (6/29/07) at 15).

With respect to Counts II and III, which claimed that the Port Authority and Officer Erickson, acting under color of State law, had deprived Revell of his property (firearm, ammunition, holster, locks, and hard case containers) without due process of law, as guaranteed by the Fourteenth Amendment, and sought redress in the form of monetary relief (Count II) and injunctive relief (Count III), the district court granted leave for Revell to reframe these counts as "a claim alleging that the Port Authority's post-

---

[1] The Association sought and obtained permission to take an interlocutory appeal from the dismissal to the United States Court of Appeals for the Third Circuit, which, by order of April 1, 2009, reversed and remanded, holding that the District Court had abused its discretion and that the Association had standing to pursue its claim on behalf of its members. No. 07-3655. That claim is pending before the district court.

deprivation remedies for the return of seized property are constitutionally inadequate." App. 67a (Opinion (6/29/07) at 14). Revell timely filed an amended complaint, recasting Counts I-III as permitted by the district court.

In the amended complaint, Count I asserted a § 1983 claim for damages pursuant to the Fourth Amendment; Count II pled a claim for damages, alleging that Port Authority deprived Revell of his property without due process of law. In July, 2008, Revell voluntarily dismissed Count III after his property was finally returned.

In August, 2008, after discovery was completed, the Port Authority and Erickson filed a motion for summary judgment as to Counts I-II of the amended complaint, which the district court granted by order of March 31, 2009. App. 48a. A timely appeal was taken to the United States Court of Appeals for the Third Circuit.

By Opinion of March 22, 2010, the United States Court of Appeals for the Third Circuit affirmed the judgment of the district court, holding that the protections of § 926A did not apply during the delay in Revell's travel because he had possession of his luggage with the firearm in the locked hard case inside (which made the firearm "readily accessible") and suggesting that Revell should have surrendered his firearm to authorities during the travel delay. App.

1a.[2] A timely Petition for Rehearing was denied by the court of appeals on April 20, 2010. App. 71a. On July 8, 2010, Justice Alito granted Revell's motion to extend the time to file this petition until August 18, 2010.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals stands for the proposition that the protections of 18 U.S.C. § 926A evaporate when a traveler becomes stranded with his luggage in a state like New Jersey, through no fault of his own, and has to interrupt his journey with a stay in a hotel. Indeed, more broadly, the decision of the court of appeals effectively destroys the protections of § 926A for any traveler who must move his bags himself within or between interstate transportation facilities in a state like New Jersey, *e.g.*, moving from an airport gate to a ticket counter to check in when changing planes, moving between airports for connecting flights, or moving from a parking garage to a ticket counter. The decision effectively renders § 926A largely meaningless, and subjects victims of transportation mishaps, and those who must temporarily have custody of their luggage (including those traveling by vehicle over more than one day), to arrest and prosecution under local laws with which

---

[2] With respect to Count I, the court of appeals affirmed the dismissal and judgment on the pleadings for a different reason than that articulated by the district court, which had held that the claim in Count I could only be brought under the Fourth Amendment, whereas the court of appeals determined that Revell had not complied with § 926A. App. 17a (598 F.3d at 132, n 13).

they cannot comply, and to the seizure of their property, despite the fact that this kind of circumstance is what § 926A was intended to address.

The holding of the court of appeals necessarily relies upon the conclusion that a firearm in a locked hard case inside a piece of luggage is "readily accessible" if the luggage is in the custody of the traveler. To make this leap, the court of appeals effectively deleted the word "readily" from the statute. Under the decision, Congress need not have used the word "readily" in FOPA since "readily accessible" means no more than "accessible" in the court of appeals' view.

To give substance and effect to Congress' mandate to protect the Second Amendment rights of interstate travelers, to preclude further injustice, and to resolve an important question of federal law -- the extent to which Congress has granted protection to interstate travelers with firearms -- that has not been, but should be, settled by this Court, this Court should grant a writ.

Further, with respect to the application of the Fourteenth Amendment's Due Process Clause, the opinion of the court of appeals conflicts with a decision of a state court of last resort and has decided an important question of federal constitutional law -- whether notice and opportunity for a hearing must be afforded where seized property is retained after criminal charges are dismissed -- that has not been, but should be, settled by this Court and has decided that question in a way that conflicts with relevant decisions of this Court.

I.
THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW, INCLUDING EFFECTIVELY REPEALING A PROVISION OF AN ACT OF CONGRESS

A. Revell's Firearm Was Not "Readily Accessible" Within The Meaning Of 18 U.S.C. § 926A

In an exercise of its authority under the Supremacy Clause[3] and the Commerce Clause,[4] as well as its authority under the Enforcement Clause of the Fourteenth Amendment,[5] Congress enacted 18 U.S.C. § 926A as a means of affording interstate travelers protection from state and local laws which had the effect of barring travel with firearms through states (such as New Jersey) which prohibit the possession of firearms without a state license/permit. § 926A was part of the Firearms Owners Protection Act of 1986, Pub.L. 99-308, 100 Stat. 449 (1986), in which Congress found, *inter alia*, that:

---

[3] U.S. Const. Art VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Laws of any State to the Contrary notwithstanding.")

[4] U S. Const Art. I, Sec. 8 ("The Congress shall have Power . . To regulate Commerce . among the several States")

[5] U.S Const , Fourteenth Amendment, Sec 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.")

> the rights of citizens -- (A) to keep and bear arms under the second amendment to the United states Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies . . . .

Section 1(b), Pub.L. 99-308.

When exercising its authority under the Supremacy Clause, Congress displaces state regulation, thereby:

> simply leav[ing] the private party free to do anything it chooses consistent with the prevailing federal law. . . . On the subject covered, state law just drops out.

Nixon v. Missouri Municipal League, 541 U.S. 125, 133 (2004).

The court of appeals decision is not faithful to this principle because it undermines federal law, applying the "readily accessible" exception to § 926A where the facts before the court did not justify application of the exception, and in a way that renders § 926A largely meaningless (subjecting any traveler reunited with luggage containing a lawfully checked firearm and ammunition in locked hard cases during the course of travel to arrest and prosecution under state law).

The Enforcement Clause (Section 5) of the Fourteenth Amendment:

> grants Congress the power "to enforce" the substantive guarantees of § 1 . . . by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 727 (2003)(internal quotation marks omitted).

McDonald, et al. v. *City of Chicago, Illinois, et al.*, No. 08-1521 (June 28, 2010), held that the right to keep and bear arms is a fundamental, individual right and applied to the states through § 1 of the Fourteenth Amendment. Accordingly, Congress has the power to deter violation of the right to keep and bear arms by the states through the enactment of legislation. Congress exercised this power when it enacted § 926A. Yet the court of appeals has effectively rendered that exercise of power a nullity by applying the "readily accessible" exception in § 926A where the facts before the court clearly did not justify application of the exception.

The gravamen of the decision of the court of appeals is the following:

> Looking solely at the allegations of Revell's original complaint, it is also clear that what happened here does not fall within § 926A's scope because his firearm and ammunition were readily accessible to him during his overnight stay in New Jersey.

App. 16a (598 F.3d at 136).

In particular, the court of appeals stated:

> The complaint reveals that Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel. He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., *[he] went directly to, and stayed the night at, the Airport Sheraton Hotel.*" (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him.

App. 17a (598 F.3d at 136) (Emphasis added).

The court of appeals then summarily concluded:

> Taking those facts as true, it is clear that the gun and ammunition were readily accessible to Revell during his stay in

> New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A.

Id.

On a motion to dismiss under Fed. Rule Civ. Pro. 12(b)(6), and for judgment on the pleadings under Fed. Rule Civ. Pro. 12(c), the court must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002). Further, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

The court of appeals' conclusion that Revell's firearm was "readily accessible" to him during his overnight stay is not supported either by the express allegations of the complaint or by a construction of those allegations which is favorable to the pleader.

A firearm is "readily accessible" when it may be easily and quickly reached for immediate use. For example, in *Thornton v. United States,* 541 U.S. 615, 622 (2004), a firearm was "readily accessible" where the "petitioner could have reached under the driver's seat for his gun . . . ." 541 U.S. at 622. The Utah Supreme Court has explained that a firearm is readily accessible where it was "easily within [defendant's] reach in a satchel sufficiently open to permit defendant quickly to reach inside and withdraw the gun for immediate use." *State* v. *Williams*, 636 P.2d 1092, 1095 (Utah 1981). See also Florida Statutes §

790.001(16)("readily accessible for immediate use" "means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person.").

The only allegation concerning Revell's stay at the hotel was that Revell "stayed the night at, the Airport Sheraton Hotel." This allegation says nothing whatever concerning the location of the firearm, or what, if anything, Revell did with the firearm while he was in the hotel. Thus, the court of appeals conclusion must have been derived from a construction of this allegation, or inferences based upon this allegation.

But the court of appeals' conclusion construes the complaint in the light *least* favorable to Revell, which is directly contrary to the requirements of Fed. Rule Civ. Pro. 12(b)(6) and 12(c). Faithful application of Rule 12(b)(6) and Rule 12(c) yields the conclusion that, for purposes of deciding the Rule 12(b)(6) and Rule 12(c) motions, the firearm and ammunition were not "readily accessible."[6] This is particularly true because the original complaint also alleged that the firearm and ammunition were in locked containers inside Revell's luggage and, therefore, Revell could not have quickly reached into the luggage and withdrawn them for immediate use.

---

[6] Revell would note that, in his amended complaint (as the court of appeals recognized, App. 18a (598 F.3d at 136, n.14), he alleged that he "did not open either of the locked hard case containers while he was in New Jersey."

Indeed, in concluding that "it is clear that the gun and ammunition were readily accessible to Revell during his stay in New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A" (App. 17a (598 F.3d at 136)), the court of appeals has simply speculated, based solely on the allegation that Revell "stayed the night at, the Airport Sheraton Hotel," that the firearm and ammunition were "readily accessible" and has not construed the allegations of the complaint favorably to the pleader.

The conclusion that "Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel" cannot support the much stronger conclusion that Revell's firearm was "readily accessible." If mere availability of, or possession or custody of, luggage containing a firearm in a locked case automatically translates to "readily accessible," then any traveler reunited with his luggage during the course of travel (whether changing terminals, airports, or a driver stopping for the night during multi-day vehicular travel) would lose the protections of FOPA and become subject to arrest and prosecution under local laws, because such a traveler's luggage is similarly "available" to him or in his possession.

The court of appeals has effectively grafted a "non-stop transportation only" rule onto FOPA. Under the court of appeals' decision, FOPA is not available for any traveler to whom luggage containing a firearm in a locked hard case becomes available during the course of travel.

To give effect to Congress' decision to enforce the guarantees of the Second Amendment, courts cannot be permitted to deny the protection of § 926A based on mere speculation that a firearm was "readily accessible" simply because the owner was compelled to "stay[] the night" in a hotel through no fault of his own. This important question of federal law should be settled by this Court.[7]

---

[7] Having rendered void Congress' protection for an interstate traveler, the court of appeals legislated its own solution "going to law enforcement representatives" and "requesting that his firearm and ammunition be held for him overnight" (App. 21a (598 F 3d at 137-138)), even though this might constitute a waiver of Fifth Amendment rights, and law enforcement would be forbidden under state law from returning the firearm and ammunition. See N.J. Stat. Ann. § 2C:39-12 and N.J Stat. Ann. § 2C.58-3. According to the court of appeals, this would have been "a reasonable means for a responsible gun owner to maintain the protection of Section 926 . . . ." *Id.* The court of appeals notes, however, that its suggestion

> leaves unanswered the question of what the gun owner should do if the law enforcement officers decline to assist him. It may be hoped, however, that officers will not compound a blameless owner's problems in that way.

App. 21a (598 F.3d at 138, n.18).

A better solution would be to enforce the choice made by Congress.

B.
A Split In The Circuits Being Highly Unlikely, The Court Should Grant The Writ To Prevent The Creation Of An Enclave That Is Hostile To The Exercise Of Second Amendment Rights

Although there is no split in the circuits, as a practical matter, a split on this issue is highly unlikely ever to occur, because there are very few jurisdictions like New Jersey where the laws are such that FOPA is significant (so litigation that could result in a split is improbable outside those jurisdictions). And, in the few jurisdictions like New Jersey where FOPA is significant, court decisions have been hostile toward it. See *Torraco, et al.* v. *Port Authority of New York and New Jersey*, *Weasner* v. *Passalaqua, et al.*, 2010 WL 2595312 (2nd Cir. 2010). This promises deeper entrenchment on the issue, and further suggests that an eventual circuit split is highly unlikely. Allowing the court of appeals' decision to stand permits the creation of an isolated enclave where FOPA's key protections have been summarily erased and persons traveling with firearms are imperiled by an inconsistent patchwork of laws, with no recourse.

The decision of the court of appeals directly impacts the right to travel with firearms -- something Congress explicitly sought to protect, and something which implicates the free exercise of fundamental Second Amendment rights. Firearm owners risk a felony conviction merely for traveling through the states which encompass the Third Circuit, which is the very result Congress thought it eliminated by enacting FOPA. If the writ is not granted, this result will very likely become permanent.

II.
THE RETENTION OF REVELL'S PROPERTY WITHOUT NOTICE AND OPPORTUNITY FOR A HEARING VIOLATED THE DUE PROCESS CLAUSE

During the course of Revell's arrest by Officer Erickson, the firearm, holster, locks, hard case containers, and ammunition were seized by the Port Authority Police pursuant to established policy of the Port Authority. After the charges against Revell were dismissed on motion of the prosecution (on August 2, 2005), the Port Authority did nothing with respect to the seized property; it was not returned and no forfeiture proceeding was initiated. It was not until Revell filed this action (on January 27, 2006) seeking, *inter alia*, an order enjoining the Port Authority to return the property that it was returned (on July 24, 2008), two and a half years after this action was filed and almost three years after the charges against Revell were dismissed.

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., Fourteenth Amendment, § 1. In rejecting Revell's due process claim, the court of appeals concluded that the rationale of *Parratt* v. *Taylor*, 451 U.S. 527 (1981)(when a state officer randomly and without authorization departs from established state procedures, the state need only provide post-deprivation procedures) and *Hudson v. Palmer*, 468 U.S. 517 (1984)(unauthorized intentional deprivation of property by state employee does not constitute violation of procedural requirements of the

Due Process Clause if meaningful postdeprivation remedy for loss is available) applied to the retention of Revell's property because Revell:

> identified no policy requiring officers of the Port Authority to retain property that is no longer needed for a prosecution, and it is highly unlikely that such a policy exists.

App. 23a (598 F.3d at 138-139).

In fact, the First Amended Complaint alleged to the contrary, *i.e.*, that "Defendants Port Authority of New York and New Jersey and Scott Erickson deprived Revell of property without due process of law *pursuant to the established policy of Defendant Port Authority of New York and New Jersey.*" Accordingly, there is no basis for the court of appeals' statement that Revell "identified no policy" and there is certainly no basis for the court of appeals' unfounded speculation that "it is highly unlikely that such a policy exists." On the contrary, as summary judgment requires that "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)), the court of appeals should have accepted Revell's allegation as true and concluded that the rationale of *Parratt* and *Hudson* did not apply. Because the rationale of *Parratt* and *Hudson* did not apply, it is immaterial that the "the state's post-deprivation procedures, including state tort remedies, are adequate." App. 23a (598 F.3d at 139).

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court said of the right to a constitutionally mandated hearing:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and *can choose for himself whether to appear or default, acquiesce or contest*. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections*.

339 U.S. at 314 (emphasis added).

In emphasizing that the required notice allows the property owner to "choose" whether to "appear" and "contest" the allegations made by the state in its notice, *Mullane* plainly understood that it is the duty of the state, once it seizes property pursuant to state policy (which is the case here), to provide adequate notice of the process it intends to follow to prove the validity of the deprivation of the property and to provide an opportunity for a hearing at which the state bears the burden of proving its allegations concerning the seizure and at which the property owner may contest the basis for the deprivation of his property. Under *Mullane*, therefore, there is no obligation on the

part of the person deprived of property by the state to seek out a forum for a hearing.

Accordingly, because the criminal charge was dismissed on August 2, 2005, Revell should not have been deprived of the property after August 2, 2005 without being provided constitutionally adequate notice and an opportunity for a post-deprivation hearing. Revell was provided neither. The Port Authority and Officer Erickson thus deprived Revell of his property in violation of the Fourteenth Amendment.

In evaluating a due process claim brought pursuant to § 1983, this Court has explained:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 126 (1990).

In the case at bar, there can be no doubt that a constitutional violation has occurred because Revell was deprived of his property for almost three years after the charges against him were dismissed. There can also be no doubt that the State provided no process whatever, let alone constitutionally adequate process.

Thus, there is a constitutional violation actionable under § 1983.

In addition to being inconsistent with this Court's decisions, the court of appeals decision conflicts with a decision of the Court of Appeals for the District of Columbia, *Ford* v. *Turner*, 531 A.2d 233 (D.C. 1987).

In *Ford*, in response to the plaintiff's contention that she had been deprived of her property without due process, the police chief argued that "§§ 22-3217(d) provides Ford with a constitutionally adequate means of challenging the police seizure and/or retention of the guns without need for a separate notice." 531 A.2d at 236.[8] The court rejected that argument, holding that § 22-3217 "is not even arguably constructive notice of the government's position and of Ford's rights . . . ." 531 A.2d at 237. Further, the court held:

> This failure to give Ford notice "reasonably calculated" to inform her of the reasons why the Property Clerk held the guns and of the means by which Ford could challenge appellees' continued custody of them violated due process. *Memphis Light, Gas & Water Division,* 436 U.S. [1] at 14, 98 S.Ct. [1554] at 1563 [(1978)]("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit

---

[8] D.C Code § 22-3217 is now § 22-4517

> adequate preparation for, an impending `hearing.") (footnote omitted). *At a minimum, she was entitled to notice that certain property had been seized, that the District sought to retain the property pursuant to specified authority, and that a claimant could take particular steps to challenge the District's action.*

531 A.2d at 237-38 (emphasis added).

In the instant matter, no notice that the Port Authority sought to retain the property pursuant to specified authority and that Revell could take particular steps to challenge the Port Authority's action was ever given to Revell. Accordingly, the Port Authority violated Revell's right not to be deprived of his property without due process.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

RICHARD E. GARDINER*
Suite 403
3925 Chain Bridge Road
Fairfax, Virginia 22030
(703) 352-7276
regardiner@cox.net
Counsel for Petitioner
*Counsel of Record

August, 2010